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Supreme Court, U.S.
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No. 95-279

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM T. ATKINS,

Petitioner,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oregon

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Oregon files this brief to supplement its Response in Opposition to the Petition for Certiorari, pursuant to Supreme Court Rule 15. In doing so, the State's purpose is limited. The State is not attempting to protract the legal arguments further. Much of petitioner's Reply Brief, however, focuses on certain inconsistencies in the legal position the State has taken in this litigation, as compared to that in litigation that pre-dated this case and involved other parties. Petitioner's point about those inconsistencies goes beyond advocacy on the merits and borders on charging the State's attorneys with ethical misconduct. More specifically, petitioner suggests that the State deliberately cited inapplicable authority to the appellate courts and intentionally misled the courts in order to gain a strategic advantage in the cases then before the courts. Reply Br. 6–7, 9. Those are serious charges, ones that call for the State's response. Therefore, as officers of the Court, the State's attorneys are taking the unusual step of placing before the Court the personal affidavit of the attorney who appears to be the object of petitioner's attack and offering it as a supplement to the State's response in opposition.[1]

By way of background, the central theme of the petition for certiorari is that the State of Oregon, acting through various state officials, deprived petitioner of a remedy for refund of certain unconstitutionally collected taxes by engaging in the "bait and switch" tactics that this Court disapproved in *Reich v. Collins*, 513 U.S. ___, 115 S.Ct. 547 (1994). At the Court's request, the State filed a response to the petition. The State's argument, *inter*

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[1]The State is separately submitting the original affidavit to the Court with the Supplemental Brief. The appendix contains a copy of the original.

alia, is that this case is legally distinguishable from *Reich* because here the state had in place a pre-existing remedial statute that applies to petitioner's circumstance. Whatever reliance petitioner may have placed on other remedial statutes neither was reasonable nor deprived him of a constitutionally adequate remedy. The State also responded to petitioner's claims that the State took a contrary position before both the Oregon Supreme Court and this Court, in other litigation not involving this petitioner, by pointing to the other remedial statutes (the "general refund statutes") as a source of a remedy for claims such as petitioner's. Petitioner suggests, but does not squarely assert, that he may have relied on the State's legal arguments in those cases to which he was not a party.

The State responded that its appellate counsel was not at that stage taking a definitive position on which administrative remedies would apply to refund claims like petitioner's, but was only asserting in a general way that adequate administrative remedies are available. Moreover, the State urged that if the State's legal representations were relevant, then also relevant was the legal advice simultaneously being given to the state legislature by other attorneys in the Oregon Department of Justice. Those attorneys concluded that the "invalidation refund statutes" applied to petitioner's precise type of claim, advice not communicated to the appellate counsel. Br. In Opp., at p. 21, n. 16.

Petitioner has now filed a Reply Brief, taking issue with the State's argument in various respects, but particularly taking issue with the State's description of its oversight in citing to the general refund statutes in earlier litigation. In his reply, petitioner asserts that the State's description is demonstrably incorrect, and he specifically points out that the appellate counsel had in fact cited the invalidation statutes as well in earlier rounds of

litigation involving other parties, and thus was aware of the existence and application of those statutes. Reply Br. 6–7.

Petitioner is both right and wrong. Petitioner is right in his objective recitation of the facts: that is, that the same appellate counsel who argued to the Oregon Supreme Court in July of 1991 that the invalidation refund statutes apply when a tax law is struck down also cited the general refund statutes to this Court in December of that same year. Petitioner is incorrect in attributing a sinister motive to what at best qualifies as an inadvertent error. As set out in the affidavit of Oregon Assistant Attorney General Robert M. Atkinson, which is appended to this brief, that citation was the product of oversight, not of an intent to mislead or some other corrupt design. As also explained in that affidavit, the citation related to a collateral point, one that likely played little or no role in the Court's assessment of the merits of the legal question presented, and that therefore may not have been examined or researched as extensively as other legal arguments in the case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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December 21, 1995

No. 95-279

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM T. ATKINS,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Respondent.

AFFIDAVIT

I, Robert M. Atkinson, do depose and say:

1. I am employed by the Oregon Department of Justice as an Assistant Attorney General in the Appellate Division. I was assigned to write the State's Oregon Supreme Court briefs in both *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), and *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992). I was also the primary author of the State's Brief in Opposition to Certiorari in *Nutbrown v. Munn*, No. 91-457.

2. Plaintiffs in *Nutbrown* argued, both in the Oregon courts and in this Court, that because they brought their claims under 42 U.S.C. § 1983, they were excused from the statutory requirement that they exhaust available administrative remedies. In response, I argued in the Oregon Supreme Court that in cases challenging tax laws, as opposed to challenges to other state action brought under section 1983, adequate administrative remedies must first

be exhausted. I relied in part for that argument on this Court's opinion in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). In describing the state's administrative procedures for obtaining refund of taxes to the Oregon Supreme Court, I cited Or. Rev. Stat. §§ 305.270 and 314.415, the "general refund statutes." Although the attorneys in the tax section of our General Counsel Division had cited Or. Rev. Stat. §§ 305.765 through 305.785, the "invalidation refund statutes," to the Tax Court, I was unaware of the existence of those statutes when I prepared the brief in the Oregon Supreme Court.

3. When I wrote the brief in opposition to the petition for certiorari in *Nutbrown*, I adopted whole sections of the brief I filed in the Oregon court and made relatively minor changes to other sections of that brief. The petitioners argued, *inter alia*, that they should be excused from the exhaustion requirement because the administrative process was "burdensome." Again I cited to and relied on *Rosewell*. In *Rosewell*, the Court held that under the federal Tax Injunction Act, state remedies are adequate if the combination of administrative procedures and available judicial review provides "a full hearing and judicial determination of the controversy." I argued first that the same standard should apply, even though *Nutbrown* did not involve that federal Act. I argued further that because Oregon provides a full hearing before DOR, followed by available judicial review in the Tax Court and the Oregon Supreme Court, it met the *Rosewell* standard. Then I added: "Moreover, the Illinois system [at issue in *Rosewell*] provided no interest to the ultimately victorious taxpayer, unlike the Oregon system. *See* Or. Rev. Stat. §§ 305.220, 305.222, 305.270 and 314.415." In context, the reference to interest was not central, or even particularly significant, to our argument

inasmuch as the Illinois statutes that survived constitutional scrutiny in *Rosewell* did not provide interest.

4. After I filed the *Nutbrown* brief in the Oregon Supreme Court and before I filed the brief in opposition in that same case in this Court, I briefed and argued *Ragsdale* to the Oregon Supreme Court. In *Ragsdale* a federal retiree sought a refund of all taxes ever paid on her federal pension. I argued that the invalidation refund statutes, not the general refund statutes, applied. At the time I filed the brief in opposition in *Nutbrown*, *Ragsdale* remained under advisement in the Oregon Supreme Court. *Ragsdale* was decide on January 3, 1992, after the brief in opposition in *Nutbrown* was filed.

5. I cannot explain why I did not recognize at the time I wrote the brief in opposition in *Nutbrown* that if we prevailed in *Ragsdale*, it would be the invalidation statutes, not the general refund statutes, that would apply. It appears that I simply relied on what I had said in the *Nutbrown* brief I filed in the Oregon court and used it again without considering the implications for that argument of a holding in *Ragsdale* that the invalidation refund statutes and not the general refund statutes applied. I did not intend to mislead this Court by the citation to the general refund statutes. That citation was simply an oversight.

/s/ Robert M. Atkinson
Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 18 day of December, 1995.

/s/ Linda K. Miller
Notary Public for Oregon
My Commission Expires: 6/19/99